Supreme Court, U.S.
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In The

Supreme Court of the United States

THE BOON INSURANCE AGENCY, On Behalf of Itself and All Others Similarly Situated,

Petitioner,

vs.

AMERICAN AIRLINES, INC., CONTINENTAL AIRLINES, INC., DELTA AIRLINES, INC. and AMERICA WEST AIRLINES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals, Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court held in *American Airlines v. Wolens*, 513 U.S. 219 (1995), that the Airline Deregulation Act, 49 U.S.C. §§40101, *et seq.* (the "ADA"), does not preempt routine breach-of-contract actions brought against airlines in state courts, because contract law is not "diverse, nonuniform, and confusing."

The question presented is whether, under *Wolens*, the ADA preempts state-court contract actions in which a plaintiff sues an airline to recover monies it paid pursuant to penalty clauses that are uniformly forbidden under contract law.

PARTIES

Petitioner The Boon Insurance Agency, on behalf of itself and all others similarly situated, was the Plaintiff-Appellant before the Texas Court of Appeals, and the Plaintiff-Petitioner before the Supreme Court of Texas. Respondents American Airlines, Inc., Continental Airlines, Inc., Delta Airlines, Inc., and America West Airlines, Inc. were the Defendants-Appellees before the Texas Court of Appeals, and Defendants-Respondents before the Supreme Court of Texas.

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I. OPINIONS BELOW

The March 30, 2000, opinion of the Texas Court of Appeals, Third District, affirming the District Court of Travis County's summary judgment, is published as *The Boon Agency, Inc., et al. v. American Airlines, Inc., et al.*, 17 S.W.3d 52 (Tex. Ct. App. 2000). *See* App. 1-15. The Court of Appeals' "Judgment" and denial of rehearing are reprinted at App. 16-18. The Supreme Court of Texas's August 17, 2000, order denying Boon's petition for further review is reprinted at App. 21. The district court's "Final Summary Judgment" is unpublished, and reprinted for the Court's convenience. *See* App. 19-20.

II. BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Texas denied further review of the Texas Court of Appeals' affirmance of summary judgment on August 17, 2000. App. 21. This Court has jurisdiction under 28 U.S.C. §1257(a).

III. STATUTORY PROVISIONS INVOLVED IN THE CASE

A. Airline Deregulation Act Preemption Clause

49 U.S.C. §41713 (1999)

49 U.S.C. §41713. Preemption of authority over prices, routes, and service

* * *

(b) Preemption. – (1) Except as provided in this subsection, a State, political subdivision

of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

B. Airline Deregulation Act "Savings Clause"

49 U.S.C. §40120 (1999)

49 U.S.C. §40120. Relationship to other laws

* * *

(c) Additional remedies. – A remedy under this part is in addition to any other remedies provided by law.

IV. STATEMENT OF THE CASE

A. Introduction

In 1978, Congress enacted the Airline Deregulation Act, 49 U.S.C. §§40101, *et seq.* ("ADA"), which largely deregulated domestic air transport. To ensure that the states would not undo federal airline deregulation with regulations of their own, Congress included in the ADA a preemption provision prohibiting the states from enacting or enforcing any law relating to airline prices, routes, or services. *American Airlines v. Wolens*, 513 U.S. 219, 222-23 (1995); *see also Morales v. Trans World Airlines*, 504 U.S. 374, 378-79 (1992). Significantly, Congress also included in the ADA a "savings clause," preserving existing common law remedies. *See* 49 U.S.C. §40120(c); *see also Wolens*, 513 U.S. at 232. It is the ADA's preemption

provision, and its effect upon a contract action brought against four airlines in a Texas state court, that lie at this Petition's heart.

In *Wolens*, this Court held that the ADA's preemption clause was *not* a blanket preemption of *all* state law; rather, the ADA would not preempt a state-court action requiring the enforcement of Illinois state contract law, because at its core, state contract law is *not* " 'diverse, nonuniform, and confusing.' " *Wolens*, 513 U.S. at 233 n.8 (citation omitted). In other words, general contract law was not so state-specific that it would be used by litigants to undo federal deregulation. Myriad courts in a variety of state and federal fora recognize that the ADA does not preempt contract actions involving airlines.[1]

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[1] *See, e.g., Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996) (reversing preemption of contract claims); *In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d 1133 (D. Minn. 1999); *Johnson v. American Airlines*, 663 N.E.2d 54 (Ill. App. Ct. 1996) (Illinois breach-of-contract claims not preempted by the ADA); *Seals v. Delta Air Lines*, 924 F. Supp. 854 (E.D. Tenn. 1996) (court undertakes "*Erie*" analysis to decide *which state's contract law applies*); *Shupe v. American Airlines*, 893 S.W.2d 305 (Tex. Ct. App. 1995) (plaintiff's contract claims not preempted), *aff'd sub nom. Continental Airlines v. Kiefer*, 920 S.W.2d 274 (Tex. 1996); *Hoo Siong Chow v. Trans World Airlines*, 544 N.E.2d 548 (Ind. Ct. App. 1989) (court looks to *Restatement (Second) of Contracts* §90 (1997), and grants promissory estoppel recovery); *Crites v. Delta Air Lines*, 341 S.E.2d 264 (Ga. Ct. App. 1986) (applying Georgia contract law to alleged breach); *Vick v. National Airlines, Inc.*, 409 So. 2d 383 (La. Ct. App. 1982) (court finds breach of contract, and utilizes principles of foreseeability, mitigation, and availability of non-pecuniary damages for ticket purchasers' mental distress).

It is beyond dispute that "[i]n all pre-emption cases, and *particularly* those in which Congress has 'legislated . . . in a field which the States have *traditionally occupied*,' we 'start with the assumption' " that those fields were not to be superseded " 'unless that was the clear and manifest purpose of Congress.' " *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis added, citation omitted). Despite this axiom, and *Wolens'* holding, the Supreme Court of Texas has refused to grant review of a conflicting Texas Court of Appeals' holding that although actions brought to *enforce* contract terms are not preempted by the ADA, actions brought challenging a liquidated damages clause as unenforceable under Texas contract law are preempted. In other words, as the Texas Court of Appeals reads *Wolens, defenses* to recovery for breach of contract are always preempted, because their adjudication would require a court to look "outside" the bare words of the contract and apply basic contractual principles. This is directly at odds with *Wolens*.

B. Factual Background

Petitioner The Boon Insurance Agency is a Texas insurance agency which frequently purchases economy-class air travel tickets for its employees from the Respondent airlines. Respondents' air travel tickets constitute "contracts of carriage" between them and ticket purchasers like Boon. Of particular note for this Petition, the airlines' economy-class tickets include standardized monetary penalties to dissuade ticketing changes.

The penalties typically operate as follows: when a passenger does not fly on a Respondent airline as ticketed, he forfeits the entire fare unless he applies it toward a new contract of carriage within a certain time – *and* pays an additional $75 "reissue fee." Regardless of the actual ticket price or services Respondents provide, the penalty features *remain the same* in every contract of carriage.

Boon's employees were unable to travel on the Respondent airlines in accordance with their travel itineraries at various times in 1997 – in effect, breaching the contracts. Pursuant to the contractual penalty terms, Respondents retained the full ticket prices until Boon rebooked other flights and paid reissue penalties (plus the difference in fares).

Boon, on behalf of itself and a class of similarly situated ticket purchasers, sued Respondents in Travis County, Texas, district court to recover monies it paid the airlines pursuant to the penalty clauses. Because the amount of each penalty bore no rational relation to either the ticket prices *or* what it cost Respondents to reissue the tickets, Boon alleged that it had been forced to pay illegal contract penalties disguised as liquidated damages. *See, e.g., Restatement (Second) of Contracts* §356 (1997) (Liquidated Damages and Penalties). Boon alleged that Texas law, consistent with contract-law principles uniform in each of the United States, forbade the illegal penalties.

C. Procedural History

1. Travis County, Texas, District Court

The federal question presented by this Petition – whether §41713(b) of the ADA preempts Boon's state-law contract claims – was initially raised by Respondents in the Texas state district court as the sole ground supporting their motion for summary judgment. App. 2.

In a brief order dated February 2, 1999, the district court granted Respondents' motion for summary judgment. App. 19. The court granted summary judgment on the ground that the ADA completely preempted Boon's contract claims, and in the February 2, 1999, summary judgment hearing, said that *Wolens*, 513 U.S. 219, forbade Boon's contract suit against the airlines because its claims seemed to rest on the proposition that "a particular provision of the contract is unenforceable as a matter of public policy because it's unfair[.]" App. 23. Boon's counsel respectfully disagreed, pointing out that Boon was arguing a *limitation* of the remedy on a breach of contract. App. 23. The court was not dissuaded: "Isn't that exactly what *Wolens* says in this footnote 8 that you can't do?" App. 24, referring to the footnote in *Wolens* in which this Court recounts the concern of the United States as *amicus curiae* that *some* state-law principles of contract law might be preempted to the extent they seek to effectuate the state's public policies. *Wolens*, 513 U.S. at 233 n.8. Counsel demurred, explaining that this Court never adopted that quotation. App. 24. Instead, this Court had dismissed the United States' concern by explaining that "contract law is not at its core 'diverse, nonuniform, and confusing,' "

thus obviating a "risk of nonuniform adjudication" of contract actions. *Wolens*, 513 U.S. at 233 n.8.

The district court remained unpersuaded, App. 24, and granted summary judgment in Respondents' favor. App. 27-28.

2. Texas Court of Appeals

Boon argued on appeal that the ADA did not preempt its claims of illegal contractual penalties because it was not seeking to have Texas enforce its own government-imposed policies, but rather to apply the uniform rules governing every contract in all 50 states. Boon pointed out that this Court had upheld a similar distinction in *Wolens*, remanding a contract dispute to state court while explaining that there was "no large risk of nonuniform adjudication" in state-court contract actions involving airlines. 513 U.S. 233 n.8. Boon asserted that enforcing normative rules against contractual penalties was consistent with Congress's express aim of promoting, through the ADA, economic efficiency in airline travel. *See, e.g., Wolens*, 513 U.S. at 230.

Boon also explained that the ADA's "savings" clause expressly provides that common law remedies – like those arising from contract actions – are not preempted by the statute: to the contrary, any remedies under the ADA are "in addition to any other remedies provided by law." 49 U.S.C. §40120(c); *see also Wolens*, 513 U.S. at 232 ("conclusion that the ADA permits state-law-based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the [ADA's] savings clause"). Boon noted that it had no alternative forum

in which to pursue its remedies against Respondents – a harsh reality that this Court expressly recognized in *Wolens*, when it explained that the Department of Transportation did not have the resources to resolve contract disputes, and nor was it "plausible that Congress meant to channel into federal courts the business of resolving . . . the range of contract claims relating to airline rates, routes, or services." *Id.*

Despite Boon's arguments, the Texas Court of Appeals affirmed the district court's summary judgment in a March 30, 2000, opinion (the "Texas Opinion"). App. 1-15. Interpreting the ADA's preemption clause broadly, rather than narrowly as instructed by this Court, *Kelly v. Robinson*, 479 U.S. 36, 43 (1986), it held that Boon's contract claims related to a "price" charged by Respondents, and therefore were "within the Act's preemption." App. 10. Although it acknowledged that this Court has recently construed "related-to" language more narrowly in preemption analyses, *see, e.g., California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316 (1997), the Court of Appeals said that this Court's original discussion on the same subject in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992) was the final word on the ADA. App. 7 n.5.

The Court of Appeals also held that under the *Wolens* analysis, *only* "breach-of-contract claims concerning the terms of the parties' agreement" could be brought in state court. App. 11. Boon was not seeking *to enforce* the contract as written, said the Court of Appeals, because it sought repayment of monies illegally collected from it under the guise of liquidated damages. Rather, Boon's claim "is an attempt to avoid the preemption clause and

defeat the [ADA's] intent." App. 12. Despite this Court's admonishment that the Department of Transportation was unable to resolve contract disputes involving airlines, *Wolens*, 513 U.S. at 234, the Court of Appeals said Boon should turn to that very Federal agency to "seek relief." App. 12 n.9.

The Court of Appeals then affirmed summary judgment against Boon, App. 15, and rendered a separate judgment in which it stated that there had been "no error in the trial court's judgment." App. 16.

3. Supreme Court of Texas

Boon timely petitioned the Supreme Court of Texas for review of the Court of Appeals' affirmance of summary judgment. On August 17, 2000, the Supreme Court of Texas denied further review without a written opinion, App. 21, giving this Court jurisdiction. *See* 28 U.S.C. §1257(a); *see also* S. Ct. Rule 13.1.

V. ARGUMENT

A. The Texas Court of Appeals Has Decided an Important Federal Question in a Way that Conflicts with this Court's Relevant Decisions

Simply put, the Texas Opinion misconstrues *Wolens* to mean that the only state-law contract actions allowed under the ADA are those in which the parties seek mechanically to *enforce* the bare words of a contract – but not those actions in which one party alleges that the contract contains an illegal penalty clause or fails for another reason. This decision on an important federal

question conflicts with relevant decisions of this Court. *See* S. Ct. Rule 10(c).

The Texas Opinion rests upon a hypertechnical distinction, found nowhere in *Wolens*, between a claim to *enforce* a contract, and a claim or defense challenging an illegal contractual penalty. The Texas Court of Appeals says that *Wolens* allows the former, but forbids the latter, creating an absurdity of immense proportions given the wide range of contexts in which contract actions arise – actions for damages, reformation, specific performance, and declaratory judgments – and the issues they necessarily raise, like contract formation, illegality, or rescission, to name but a few. Taken to its logical conclusion, the Texas view means that no party to an airline-related contract dispute ever may rely upon any argument other than the contract as written. Defenses to the enforcement of a contract – like lack of capacity, mistake, or lack of consideration – never could be asserted or considered, according to Texas, because they would impermissibly "modify" the terms of the bargain the parties had struck. App. 12.

But that is not what *Wolens* holds. This Court explained that, at its core, contract law is *not* " 'diverse, nonuniform, and confusing.' " *Wolens*, 513 U.S. at 233 n.8 (citation omitted). Thus, there is no "large risk of nonuniform adjudication" of contract claims by courts in different states. *Id.* The application of contract principles – which must necessarily include *defenses* to breaches of contract – simply is not equivalent to a state applying its

"*own* substantive standards." *Id.* at 232 (emphasis added).[2]

A closer examination of *Wolens* reveals the extent to which the Texas Court of Appeals misconstrued its holding. Plaintiff Wolens sued American Airlines on behalf of a class composed of the airline's "frequent flyers," alleging that the airline's retroactive devaluation of frequent-flyer credits was both a breach of contract under Illinois law *and* violated Illinois' consumer fraud statute. *Wolens*, 513 U.S. at 224-25. American Airlines asked this Court to affirm that the ADA's preemption provision blocked application of Illinois' consumer protection and contract laws, but it was only partly successful.

This Court held that Wolens' consumer fraud claim was preempted by the ADA, but that his common-law contract claim could proceed. *Id.* at 226. The Court explained that the ADA's ban on state enforcement is "most sensibly read" to mean that a state cannot seek to impose its *own* public policies, or theories of competition or regulation, on air carrier operations. *Id.* at 229 n.5.

Under this analysis, only Wolens' consumer fraud claim was barred because the Illinois Consumer Fraud Act was the type of policy-laden consumer protection

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[2] Scholars and commentators have long recognized that the "*entire law of contracts* plays a major role in determining the terms of [a] contract." 1 *Corbin on Contracts* §1.3 (1993) (emphasis added). "A contract is not a law, nor does it make law; *it is the agreement plus the law* that makes the ordinary contract an enforceable obligation." 17A *Am. Jur. 2d, Contracts* §1 (1991) (emphasis added).

legislation that the Court previously had deemed preempted. *Id.* at 227 (citing *Morales*, 504 U.S. 374). The application of Illinois state contract law to his claims posed no such problems, however. Indeed, the Court sent the case back to the Illinois state court for a "full airing" of "contract interpretation" issues, knowing full well that both sides would offer all arguments in favor of and against contract enforcement. *Id.* at 234.

But the Texas Opinion equates *any* reference by plaintiffs to state-law contract defenses to this Court's rejection of impermissible " 'enlargement or enhancement based on state law or [state] policies external to the agreement.' " App. 12 (quoting *Wolens*, 513 U.S. at 233). This view obliterates the careful distinction *Wolens* made between courts applying uniform contractual principles, as opposed to venturing into the forbidden realm of *state*-dictated, policy-laden principles that *would* enlarge or enhance enforceable bargains.

The Texas Opinion also conflicts with this Court's conclusion that "the ADA permits state-law-based court adjudication of routine breach-of-contract claims" because of "Congress' retention of the [ADA's] saving clause." *Wolens*, 513 U.S. at 233.[3] The ADA's preemption

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[3] The ADA's "savings clause" expressly provides that common-law remedies – like those arising from contract actions – are not preempted, but are "in addition to any other remedies provided by law." 49 U.S.C. §40120(c). At the time of the *Wolens* decision, the ADA's savings clause expressly preserved " 'the remedies now existing at common law or by statute.' " *Wolens*, 513 U.S. at 232 (quoting 49 U.S.C. §1506 (repealed)). The savings clause now similarly states that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C.

provision, complemented by its savings clause, simply "stops States from imposing their own substantive standards with respect to rates, routes, or services, *but not from affording relief* to a party" alleging contract claims. *Wolens*, 513 U.S. at 232-33 (emphasis added). And the Texas Court of Appeals fails to heed *Wolens'* admonition that state court is the proper setting for airline-related contract disputes, because it was "not plausible" that Congress meant to channel into the federal courts "the range of contract claims relating to airline rates, routes, or services." *Id.* at 232.[4]

Because the Texas Opinion starkly conflicts with this Court's *Wolens* opinion, a writ of certiorari is warranted.

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§40120(c). The change was made to eliminate unnecessary words and add clarity and consistency to the title. H.R. Conf. Rep. No. 103-180, at 276 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 1093.

[4] The Court of Appeals suggested that Boon has a "forum" for its claims before the Department of Transportation. App. 12 n.9. That suggestion rings hollow, however, because this Court has already explained that "the DOT has neither the authority nor the apparatus required to superintend a contract dispute resolution regime." *Wolens*, 513 U.S. at 232. Nor would a petition, even if successful, remedy injuries already suffered by Boon and the thousands like it who have been forced to pay illegal contract penalties: the DOT cannot reimburse ticket purchasers for monies they have forfeited to Respondents' illegal contract penalties. Even when the DOT penalizes airlines for violations of DOT rules and regulations, there is no provision for payments to the private parties injured by those violations. *See, e.g., Romano v. American Trans Air*, 56 Cal. Rptr. 2d 428, 431 n.5 (Cal. Ct. App. 1996) ("There is no provision for the recovery of damages by a private party.").

B. A Definitive Answer to the Question Presented Will Ensure that Airlines Abide by Normative Contract Rules, While Reaffirming a Continuing Respect for Federalism, and Further Refining an Unsettled Area of Law

In addition to its clear conflict with *Wolens*, the Texas Opinion impermissibly erodes contractual norms and elevates airlines – in contract actions, at least – to virtually untouchable status. By preempting uniform and basic contract principles such as these rejecting forfeitures, the Texas Opinion excludes bedrock principles from all airline-related contracts. Texas state courts facing airline-related contract suits are now prohibited from applying the core principles inherent in every contract – like offer and acceptance, or defenses to enforceability – and instead only can read the contract. Airlines will be free to form and enforce contracts in Texas containing any imaginable term, no matter how onerous or illegal.

Surely this is not what Congress intended when it passed the ADA. This Court seems to agree. *See Morales*, 504 U.S. at 390 (ADA did not give airlines *"carte blanche"* to injure consumers); *see also Air Transp. Excise Tax*, 37 F. Supp. 2d at 1140 (ADA not passed so that airlines could be "immunized from state law consequences"). And Congress's intent in passing the statute "is the ultimate touchstone 'in every preemption case.' " *Medtronic*, 518 U.S. at 494 (citation omitted); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). As *Wolens* made clear, Congress's purpose in passing the ADA was "to promote 'maximum reliance on competitive market forces.' " 513 U.S. at 230 (quoting *Morales*, 504 U.S. at 378). It was not to trample on traditional areas of state oversight.

Bedrock principles of federalism require that courts not infer a scope of preemption beyond that which Congress clearly mandated. *Department of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994); *Cipollone v. Liggett Group*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring). "In all pre-emption cases, and *particularly* those in which Congress has 'legislated . . . in a field which the States have *traditionally occupied*,' we 'start with the assumption' " that those fields were not to be superseded " 'unless that was the clear and manifest purpose of Congress.' " *Medtronic*, 518 U.S. at 485 (emphasis added, citation omitted). The Texas Opinion ignores that assumption, however, and approves a result fraught with anti-federalism implications.

This Court recognized that the reach of ADA preemption could not be defined " 'on the basis of one or two cases, but require[s] a closer working out.' " *See Wolens*, 513 U.S. at 234-35 (citation omitted). Since *Wolens*, other courts have "struggled to draw the line that separates allowable state law claims from ADA-preempted ones." *Air Transp. Excise Tax*, 37 F. Supp. 2d at 1139; *see also Charas v. Trans World Airlines*, 160 F.3d 1259, 1263 (9th Cir. 1998) (en banc) (scope of ADA preemption has been the "source of considerable dispute since its enactment"). With its expansive application of ADA preemption, the Texas Court of Appeals has presented this Court with the opportunity to further elucidate and rationalize the contours and limitations of *Wolens* – a "closer working out." *Wolens*, 513 U.S. at 234-35.

VI. CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

DATED: November 15, 2000

Respectfully submitted,

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**TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN**

NO. 03-99-00089-CV

**The Boon Insurance Agency, Inc.,
Individually and on Behalf of All Others
Similarly Situated, Appellant**

v.

**American Airlines, Inc.; Continental
Airlines, Inc.; Delta Airlines, Inc.; and
America West Airlines, Inc., Appellees**

**FROM THE DISTRICT COURT OF TRAVIS
COUNTY, 345TH JUDICIAL DISTRICT NO. 98-08724,
HONORABLE F. SCOTT MCCOWN,
JUDGE PRESIDING**

Appellant The Boon Insurance Agency, Inc. ("Boon") appeals the district court's summary judgment in favor of appellees, American Airlines, Inc.; Continental Airlines, Inc.; Delta Airlines, Inc.; and America West Airlines, Inc. (collectively, the "Airlines"). Their dispute arises from certain restrictions on economy-class airline tickets that Boon purchased from the Airlines. Boon brought a class-action suit[1] against the Airlines in district court charging that a reissue fee and other penalties imposed by the Airlines when a holder of an economy-class ticket fails to travel according to the ticket's original terms constitute

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[1] *See* Tex. R. Civ. P. 42.

illegal forfeitures and penalties prohibited by state law. The Airlines moved for summary judgment on the sole ground that Boon's claim is preempted by section 41713(b)(1) of the Airline Deregulation Act of 1978 (the "Act").[2] The district court granted the Airlines' motion. Boon complains on appeal that: (1) the district court erred in requiring Boon to prove its claims were not preempted by the Act; (2) summary judgment was improper because (a) the Act does not preempt claims that involve common law breach-of-contract claims, and (b) genuine issues of material fact exist; and (3) the district court erred by denying Boon's discovery request. Because we find that the district court did not misplace the burden of proof, federal law preempts Boon's claim, there are no genuine issues of material fact, and Boon's discovery request was not improperly denied, we will affirm the district court's summary judgment.

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[2] Congress enacted the Act in 1978. *See* Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978). The Act contained a preemption clause that read in relevant part: "[N]o State . . . shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier. . . . " Pub.L. No. 95-504, § 4(a), 92 Stat. 1705, 1707-08 (1978) (codified at 49 U.S.C. App. § 1305(a)(1)) (amended and recodified 1994). Congress recodified and revised many transportation laws, including the Act, in 1994 and revised the preemption clause to read: "[A] State . . . may not enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier. . . . " Act of July 5, 1994, Pub.L. No. 103-272, § 1(a), 108 Stat. 745, 1143 (1994) (codified at 49 U.S.C.A. § 41713(b)(1) (West Supp. 1999)). Congress intended no substantive change by its 1994 revisions. *See id.* at 745.

BACKGROUND

The Airlines stipulated that for the purpose of summary judgment, the facts in Boon's first-amended class-action petition are true. Our facts, therefore, are taken from the pleadings before the district court.

Between 1996 and 1997, Boon purchased economy-class airline tickets from each of the Airlines. A ticket constitutes a "contract of carriage" between the passenger and the airline, whereby the airline agrees to provide transportation between certain locations on specific dates in return for the purchase price of the ticket and the passenger's agreeing to travel according to the ticket's terms. An economy-class ticket is available for a lower price because it is subject to conditions that a full-price, fully refundable ticket is not, including fees associated with changing the terms of travel.[3]

If a passenger with an economy-class ticket does not fly as ticketed and wishes to rebook a flight, the passenger may apply the original fare toward a new ticket for travel within a specified period of time. However, the passenger must also pay a "reissue fee" ranging from fifty to seventy-five dollars. If the original ticket is not used or reissued, the passenger forfeits the entire fare. At issue in this case is the potential forfeiture of the full ticket price and the reissue fee imposed upon a passenger

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[3] As described in Boon's pleadings to the district court, "Economy-class tickets are subject to travel restrictions which customarily require: a) tickets to be purchased a specified number of days prior to departure; b) travel be completed by a specified deadline; c) minimum and maximum stay requirements; and, d) seat and flight limitations."

who fails to travel according to the ticket's terms. Boon claims that the reissue fee and the retention of the fare amount to illegal forfeitures and penalties and as such are unenforceable under Texas law. *See Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991).

The Airlines moved for summary judgment on the ground that Boon's claims were preempted by the Act, which specifically prohibits a State from enforcing a law or regulation that relates to the price, route, or service of an air carrier. *See* Act § 41713(b)(1). The district court granted the Airlines' motion, implicitly finding that Boon's claim was related to the Airlines' prices and therefore preempted by the Act.

DISCUSSION

Boon appeals from a summary judgment in favor of the Airlines. The propriety of summary judgment is a question of law, and we review the trial court's decision *de novo*. *See Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994). The standards for reviewing a motion for summary judgment are well established: (1) the movant for summary judgment has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The function of summary judgment is not to deprive litigants

of the right to trial by jury but to eliminate patently unmeritorious claims and defenses. *See Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex. 1972).

Burden

The burden of demonstrating preemption is on the party who asserts it. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). By its second issue, Boon argues that the preemption burden and therefore the summary-judgment burden was that of the Airlines, and the district court erred by improperly shifting these burdens to Boon. Boon's argument is based solely on a statement in a brief filed by the Airlines in the district court that stated that Boon had "a difficult burden" in demonstrating that its claims were not related to the price, route, or service of the air carrier, and that it had "not met this burden." To the extent that this statement urged the district court to place the burden on Boon, it is an incorrect statement of the law.

Boon correctly states that to prevail on their summary-judgment motion, the Airlines were required to prove that Boon's claims were preempted by the Act. *See id.* Stated another way, we must address whether the Airlines established as a matter of law that section 41713(b)(1) of the Act preempts the claims asserted in Boon's suit. *See State v. Foley*, 950 S.W.2d 781, 784 (Tex. App. – Austin 1997, no writ). However, we find no evidence in the record that the district court misplaced the Airlines' burden. The district court's judgment states simply, "The Court, after examining the pleadings and the

summary judgment evidence and hearing the arguments of counsel, determines that [the Airlines] are entitled to summary judgment on all of the claims raised by [Boon] in this lawsuit." The Airlines' arguably incorrect statement in their district-court brief in no way demonstrates an improper action by the district court. We therefore overrule Boon's second issue.

Preemption

In 1978, Congress enacted the Act, which largely deregulated domestic air transport. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995). At the heart of the dispute before us is the Act's preemption clause. Congress intended that the Act preempt state law "to ensure that the States would not undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). The preemption clause states, in relevant part, "A State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to price, route, or service of an air carrier. . . . " Act § 41713(b)(1).[4]

In *Morales*, the United States Supreme Court considered Travel Industry Enforcement Guidelines, promulgated by the National Association of Attorneys General ("NAAG"). *See* 504 U.S. at 374. The NAAG guidelines purported to govern, *inter alia*, the content and format of airline-fare advertising. *See id.* at 393-418. Several states,

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[4] *See supra* note 2. We cite the current code here for convenience.

including Texas, attempted to enforce the NAAG guidelines to stop allegedly deceptive airline advertisements. *See id.* at 379. To determine whether the guidelines were preempted by the Act, the Court was initially faced with delineating the ordinary meaning of the term "related to." *See id.* at 383. The Court adopted the same meaning found in other preemption statutes: "having a connection with, or reference to, airline 'rates, routes, or services.' " *Id.* at 384.[5] The "related to" language was intended to be broad in order to express an expansive preemptive purpose. *See id.* at 383. The Court concluded that the states' initiative related to airline rates, routes, or services and therefore found that the fare-advertising provisions of the NAAG guidelines were preempted by the Act. *See id.* at 391. The Court also noted that the Act does not preempt all enforcement of state law against airlines. The Court recognized that some state actions might affect airlines in " 'too tenuous, remote, or peripheral a manner' to have pre-emptive effect" but noted that the case before it did not present a "borderline question" and expressed no

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[5] Specifically, the Court referred to similar "related to" language in the preemption clause of the Employee Retirement Income Security Act of 1974 (ERISA). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Boon argues that since the "relates to" language of ERISA has been more narrowly construed in recent opinions, *see California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 323 (1997); *Hinterlong v. S.P Baldwin*, 720 N.E.2d 315, 320 (Ill. App. Ct. 1999), the Act language should likewise be more narrowly interpreted. We will adhere to the Supreme Court's discussion of the Act's preemption clause and will not extrapolate the later ERISA cases into speculation that the Supreme Court's holdings in *Morales* and *Wolens* would be different today.

view about where it would be appropriate "to draw the line." *Id.* at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

Wolens involved a dispute between American Airlines and persons participating in its frequent-flyer program. *See* 513 U.S. at 222. Individuals enrolled in the program earned mileage credits when they flew American and could exchange those credits for tickets on subsequent flights or upgrades to a higher class of service. *See id.* at 224. Although American had reserved the right to change the terms and conditions of the program, when the airline changed the program, suit was filed challenging the retroactive application of the modifications. *See id.* at 225. The program's participants claimed that American's actions violated the Illinois Consumer Fraud and Deceptive Business Practices Act and constituted a breach of contract. *See id.*

The Supreme Court held that while the enforcement of the Illinois Act was preempted by the Act, the passengers' breach-of-contract claim was not so preempted. *See id.* at 228. The terms and conditions the airlines offered and the passengers accepted were privately ordered obligations and did not amount to a state's enactment or enforcement of any law, rule, regulation, standard, or other provision having the effect of law within the meaning of the Act. *See id.* at 229. The Court found that the Act does not prohibit state-court adjudication of routine breach-of-contract claims, so long as the court confines its decision to the parties' bargain, with no enlargement or enhancement based on state law or policies external to the agreement. *See id.* at 232. The Court

also noted that since contract law is not at its core "diverse, nonuniform, and confusing" but is similar from jurisdiction to jurisdiction, it is unlikely that there will be a "large risk of nonuniform adjudication" of what constitutes the "agreement" of the parties to a contract. *See id.* at 826.

The Texas Supreme Court discussed *Wolens* and *Morales* in *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 278-84 (Tex. 1996). *Kiefer* found that not only do common law breach-of-contract claims fall outside the scope of the Act's preemption, but so do common law negligence claims. *See* 920 S.W.2d at 278-84. With respect to breach-of-contract claims, *Kiefer* adhered to the reasoning in *Wolens*, observing that the Act will prevent states from imposing their own substantive standards with respect to rates, routes, or services but will not stop states from affording relief to a party who claims and proves that an airline dishonored a term to which the airline itself agreed. *See id.* at 280. The court reiterated the language of *Wolens*, stating that in breach-of-contract claims, courts are confined to the parties' bargain. *See id.* The *Kiefer* court concluded that the Supreme Court of the United States has placed a "very strict limitation on permissible contract claims." *See id.* at 281.

In this framework, we examine Boon's claim to determine whether it is preempted by the Act. If the claim relates to the "price, route, or service of an air carrier," it is preempted. Boon argues that its claim is not related to price, since state actions that have a tenuous, remote, or peripheral effect on air fares are not preempted. *See Morales*, 504 U.S. at 390. While Boon also points out that the Act's "related to" language should not be stretched to

indeterminancy or "for all practical purposes preemption would never run its course,"[6] it is clear from *Morales*, *Wolens*, and *Kiefer* that although the "related to" language is broad, it is not overly so and is meant to encompass claims like Boon's. This Court has recently recognized that by the Act, Congress sought to ensure effective airline deregulation by enacting "a very broad and sweeping preemption to eliminate the possibility of any conflicting state regulation." *City Public Serv. Bd. v. Public Util. Comm'n*, 9 S.W.3d 868, 876-77 (Tex. App. – Austin 2000, pet. filed).[7] We hold that Boon's claim is "related to a price . . . of an air carrier" and is thus within the Act's preemption.[8]

Boon maintains that *Kiefer* allows any contract-related action under the Act if there is little risk of non-uniform adjudication among the states. The *Kiefer* court examined *Wolens*, emphasizing that since contract law is uniform, enforcing contracts is unlikely to lead to non-uniform adjudication of contract claims based upon state law. *See Kiefer*, 920 S.W.2d at 280 (citing *Wolens*, 513 U.S.

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[6] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

[7] In *City Public Service Board* we contrasted the Act's broad preemption with the relatively limited preemption of the Texas Public Utility Regulatory Act. *See City Public Serv. Bd. v. Public Util. Comm'n*, 9 S.W.3d 868, 876-77 (Tex. App. – Austin 2000, pet. filed).

[8] Other state courts have found similar claims also preempted by the Act. *See Leonard v. Northwest Airlines, Inc.*, 605 N.W.2d 425, 431-32 (Minn. Ct. App. 2000); *Blackner v. Continental Airlines, Inc.*, 709 A.2d 258, 260 (N.J. Super. Ct. App. Div. 1998), *cert. denied*, 525 U.S. 1142 (1999).

at 233 n.8). Boon reads *Kiefer* and *Wolens* incorrectly. Neither *Kiefer* nor *Wolens* hold that *every* contract-related claim may be brought; only breach-of-contract claims concerning the terms of the parties' agreement may be adjudicated in state court since contract law is not at its core diverse, nonuniform, or confusing. *See Wolens*, 513 U.S. at 233 n.8; *Kiefer*, 920 S.W.2d at 280. The *Wolens* court specifically noted that it saw no significant risk of state-to-state nonuniform adjudication of standard airline-prepared agreements. *See Wolens*, 513 U.S. at 233 n.8. *Kiefer* does not, and in the face of the Act could not, expand the scope of contract claims that may be brought before state courts.

Boon argues that under *Kiefer* and *Wolens*, its breach-of-contract claim is not preempted by the Act. It reminds this Court that although the Act is broad, it is not boundless. *See Kiefer*, 920 S.W.2d at 279. We agree that common law breach-of-contract and negligence claims are not preempted by the statute, but Boon has not brought such a claim.

"A claim for a breach of contract requires proof that (1) a binding contract existed; (2) defendants breached the contract; and (3) plaintiffs suffered damages caused by the defendants' alleged breach." *East Tex. Med. Cancer Inst. v. Anderson*, 991 S.W.2d 55, 62 (Tex. App – Tyler 1998, pet. denied); *Ryan v. Superior Oil Co.*, 813 S.W.2d 594, 596 (Tex. App. – Houston [14th Dist.] 1991, writ denied).

It is undisputed that in each instance of an economy-class ticket purchase by Boon a binding contract, a contract of carriage, was created between Boon and the airline. Each contract included the authorization of a

surcharge if the ticket was changed. Boon does not look to enforce the contract as written but instead seeks to modify the terms of the contract itself by relying on state law. This Court "is confined, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state law or policies external to the agreement." *Wolens*, 513 U.S. at 223. If we were to adjudicate Boon's claim, we would be applying state policy and law to determine the propriety of the reissue fee. Such application of state law is preempted by the Act. *See id.* at 222. Boon's assertion of its claim as one of breach of contract is an attempt to avoid the preemption clause and defeat the Act's intent. Boon does not seek the benefit of its bargain, which calls for a reissue fee, but rather seeks to invalidate its bargain by having this Court declare that the reissue fee is a penalty clause. The Act prevents us from doing so. To the extent that Boon complains that its claims are not preempted by the Act, its first issue is overruled.[9]

Genuine Issue of Material Fact

Boon's first issue also asserts that by providing uncontroverted expert testimony demonstrating that reissue fees bear no relation to ticket prices and that all states outlaw penalty clauses, Boon has raised genuine issues of

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[9] Boon contends that if this Court finds that the Act preempts its claim, then it will have no forum in which to seek relief. However, the Department of Transportation retains the authority to investigate unfair and deceptive practices and unfair methods of competition by airlines. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 227 n.4 (1995).

material fact. To support its claim, Boon relies on the affidavits of David O. Stamey, a former vice-president of Continental Airlines, and Joseph M. Perillo, a law professor.

As a general rule, summary judgment is improper where an expert's uncontroverted testimony supports the nonmoving party's case. *See Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991). Although both Stamey's and Perillo's affidavits are uncontroverted, they do not support Boon's proposition that its claim escapes preemption. "[C]ourts are charged with interpreting deregulation statutes to determine whether Congress intended to preempt whatever state action is offensive to the plaintiff in a given case." *Foley*, 950 S.W.2d at 786 (citing *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 653-54 (1995); *Morales*, 504 U.S. at 383). We therefore determine the existence of federal preemption as a matter of law. *See id.* at 784.

Stamey's affidavit states that the reissue fee is unrelated to airline ticket prices since it does not fluctuate or change according to the ticket price. In other words, the reissue fee is constant and has no relation to the actual price of the ticket. Boon argues therefore it should be able to bring its claim. However, even if the reissue fee remains constant, it has the effect of raising the price of the ticket. Boon's claim relates to that price, *i.e.*, the Airlines' charges for an economy-class ticket. Although that price changed when Boon changed its travel itinerary, Boon's claim remains related to price. *See Wolens*, 513 U.S. at 226 (finding that plaintiff's claim involving frequent-filer [sic] miles relates to airline's charges in form of mileage credits for free tickets and upgrades).

Perillo's affidavit states that all jurisdictions in the United States hold that penalty clauses are illegal and void. As such, if the reissue fee were deemed a penalty, it would be illegal in any of the states. Boon argues therefore that adjudication of its claim would not involve any application of state law or policy. Although the states may be uniform in their penalty-clause jurisprudence, it does not follow that Boon's claims can be adjudicated without applying state law or policy to the Airlines' economy-class ticket prices.

We overrule the remainder of Boon's first issue.

Discovery

By its third issue, Boon contends that the district court committed error when he declined "repeated" requests for pretrial discovery. Boon argues that the discovery was needed to determine whether the "defendant's fare forfeitures and reissue penalties 'relate to' their prices, routes or services." Specifically, Boon requested information on the development, implementation, and calculation of the reissue fees; the actual costs of the itinerary changes for which the reissue fees were assessed; and the total revenue generated from these fees.

The record reflects that the district court quashed one motion for oral deposition. We review the trial court's actions allowing or denying discovery for an abuse of discretion. *See TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). A trial court abuses its discretion when it acts in an unreasonable and arbitrary manner, or without reference to guiding rules or principles. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d

238, 241-42 (Tex. 1985). This Court may not reverse for abuse of discretion merely because we disagree with the decision of the trial court. *See Downer*, 701 S.W.2d at 242.

Here, the district court did not improperly deny Boon's request for discovery. The information Boon sought would not have precluded summary judgment. As such, the denial of the discovery request by the district court in no way prevented Boon from obtaining evidence that would have allowed it to defeat summary judgment. The district court did not abuse his discretion, and therefore, we overrule Boon's third issue.

CONCLUSION

Having overruled all of Boon's issues, we affirm the district court's judgment.

Lee Yeakel, Justice

Before Justices B. A. Smith, Yeakel and Patterson

Affirmed

Filed: March 30, 2000

Publish

**TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN**

JUDGMENT RENDERED MARCH 30, 2000

NO. 03-99-00089-CV

**The Boon Insurance Agency, Inc.,
Individually and on Behalf of All Others
Similarly Situated, Appellant**

v.

**American Airlines, Inc.; Continental
Airlines, Inc.; Delta Airlines, Inc.; and
America West Airlines, Inc., Appellees**

**APPEAL FROM 345TH DISTRICT COURT
OF TRAVIS COUNTY
BEFORE JUSTICES B. A. SMITH,
YEAKEL AND PATTERSON
AFFIRMED – OPINION BY JUSTICE YEAKEL**

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court is in all things affirmed. It is FURTHER ordered that the appellant, The Boon Insurance Agency, Inc., Individually and on Behalf of All Others Similarly Situated, pay all costs relating to this appeal, both in this Court and the

court below; and that this decision be certified below for observance.

OFFICIAL NOTICE FROM COURT OF APPEALS
THIRD DISTRICT OF TEXAS

DATE: 5/25/2000

RE: Case No. 03-99-00089-CV

STYLE: The Boon Insurance Agency, Inc., Individually and of All Others Similarly Situated v. American Airlines, Inc. Continental Airlines, Inc. Airlines, Inc.; and American Airlines, Inc.

Appellant's motion for rehearing was overruled by this Court on the date noted above.

T.C. Case # 98-08724 Diane O'Neal, Clerk

THIRD COURT OF APPEALS
P.O. BOX 12547
AUSTIN, TEXAS 78711

MAIL TO: MR. JAMES D. BASKIN III
BASKIN BENNETT & KOMKOV L L P
919 CONGRESS AVENUE SUITE 1000
AUSTIN TX 78701

NO. 98-08724

THE BOON INSURANCE AGENCY, INC., Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. AMERICAN AIRLINES, INC.; CONTINENTAL AIRLINES, INC.; DELTA AIR LINES, INC.; AND AMERICA WEST AIRLINES, INC.; Defendants.	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 345TH JUDICIAL DISTRICT

FINAL SUMMARY JUDGMENT

On February 2, 1999, the Court heard Defendants' Motion for Summary Judgment. All parties appeared by and through their respective counsel. The court, after examining the pleadings and the summary judgment evidence and hearing the arguments of counsel, determines that Defendants' American Airlines, Inc., Continental Airlines, Inc., Delta Airlines, Inc., and America West Airlines, Inc. are entitled to summary judgment on all of the claims raised by Plaintiff The Boon Insurance Agency, Inc. in this lawsuit. *All objections to summary judgment evidence are overruled. /FSM*

IT IS THEREFORE ORDERED that Plaintiff The Boon Insurance Agency, Inc. take nothing against Defendants American Airlines, Inc., Continental Airlines, Inc., Delta

Air Lines, Inc., and America West Airlines, Inc., that all claims asserted by Plaintiff The Boon Insurance Agency, Inc. in this case are denied, and that all costs of Court be taxed against Plaintiff The Boon Insurance Agency, Inc.

All relief requested and not expressly granted is denied.

Signed this 2nd day of February, 1999.

/s/ F. Scott McCown
Hon. F. Scott McCown

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

August 17, 2000

Mr. J. Bruce Bennett
Baskin Bennett & Komkov
919 Congress Avenue, Suite 1000
Austin, TX 78701

Mr. Douglas W. Alexander
Scott Douglass & McConnico
600 Congress Avenue, Suite 1500
Austin, TX 78701-2589

RE: Case Number 00-0693
Court of Appeals Number: 03-99-00089-CV
Trial Court Number: 98-08724

Style: THE BOON INSURANCE AGENCY, INC. individually and on behalf of all others similarly situated

v.

AMERICAN AIRLINES, INC., CONTINENTAL AIRLINES, INC., DELTA AIRLINES, INC., and AMERICA WEST AIRLINES, INC.

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya R. Hunter
Tanya R. Hunter,
Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

No. 98-08724

THE BOON INSURANCE AGENCY, INC., Individually and on Behalf of All Others Similarly Situated	*	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 345TH JUDICIAL DISTRICT
VS.	*	
AMERICAN AIRLINES, INC., CONTINENTAL AIRLINES, INC., DELTA AIRLINES, INC., AND AMERICA WEST AIRLINES, INC.	*	

REPORTER'S RECORD
(Hearing on Motion for Summary Judgment)

BEFORE THE HONORABLE
F. SCOTT MCCOWN, JUDGE PRESIDING

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* * *

[27] improper penalty. It is part of the doctrine of contract law just as much as Justice O'Conner pointed out in her dissenting opinion in Wolens the doctrine that a contract is construed against the author is part of the body of contract law. These are all contract claims which are permitted under Wolens. But Kiefer is more broad. Kiefer says, a personal injury claim is permitted –

THE COURT: But wait a second, wait a second. Under Wolens you've got this footnote 8 from the brief, amicus brief of the United States that says that there are some state law principles of contract law that might well be preempted to the extent they seek to effectuate the

state's public policies rather than the intent of the parties. And that footnote 8 is the note to the discussion by the majority that this distinction between what the state dictates and what the airline itself undertakes confines the parties in breach of contract actions to the parties' bargain with no enlargement or enhancement based on state laws or policies external to the agreement.

And isn't that exactly what your case is and isn't footnote 8 exactly aimed at your case, that you're not arguing a breach of contract, you're arguing that a particular provision of the contract is unenforceable as a matter of public policy because it's unfair?

[28] MR. SIMON: We're arguing a limitation of the remedy on a breach of contract. It's a little different than that. But, Your Honor, I think if you will look at Kiefer, let me say a couple of things. Foot Note 8 is quoted by both sides as support.

THE COURT: Well, let me ask you something. Just a second, just a second. Let me ask you something about that. In most penalty cases that I can think of they're factually different. The posture's factually different than your case because in most penalty cases what happens is I don't do something that I promised to do and therefore there's liquidated damages and you are suing me to get that money under the penalty provision. This is different.

This is if you didn't use your ticket, that's fine. What you're doing is you're coming to the airline and you're asking them to do something which is, issue you another ticket for which then they have this fee that you agreed to pay. And you're asking the Court to say that they have to

issue the ticket without you paying the fee that you agreed to pay because the fee is unfair.

MR. SIMON: That's precisely correct.

THE COURT: Isn't that exactly what Wolens says in this footnote 8 that you can't do?

MR. SIMON: Your Honor, the footnote [29] as a quotation from the solicitor general's brief, it is not adopted by the court and if you have any doubt as to how confusing this is, let me suggest you read Kiefer, which is in front of you at Page 280.

THE COURT: Why do you think that the Court put footnote 8 in there and why do you think they put it in there right after this language that talks about enforcing what the parties agreed to but not having an enlargement or enhancement based upon state laws or policies external to the agreement? What's that mean?

MR. SIMON: Your Honor, all I can do is point you to Page 280 at Kiefer which reads it precisely the contrary way and holds precisely the contrary and says that a negligence claim can proceed.

THE COURT: Where are we looking at?

MR. SIMON: Page 280, bottom left-hand column. Quotes the footnote, and it says, the Court rejected the argument.

THE COURT: Well, with all due respect to my Supreme Court, I am bound more by the U.S. Supreme Court and I think that Justice Hecht may be misreading footnote 8 here.

MR. SIMON: Your Honor, I think it may be misleading as to what relates to means, but I would say we are bound by it on both sides. But I think

* * *

[38] Maybe we should call it the Wolens slash Kiefer exception because we have moved beyond contracts.

THE COURT: Texas Supreme Court can't make exceptions to federal statutes.

MR. SIMON: It can interpret them Your Honor and I would suggest there's not interpretation to the contrary other than the New Jersey case. And Your Honor obviously is less bound by a New Jersey intermediate appellate decision and even less bound by the case in Washington. The Washington case, my recollection is, is a one-line order which says the defendants win in a case where the defendants offered multiple defenses even going beyond preemption. So really the closest case the highest court to have addressed whether the Wolens common law exception can be applied beyond the terms of a contract is Kiefer and I think it is hard to conclude that Justice Hecht would have come out differently on this case.

Maybe he would be wrong, maybe cert would be granted, but I don't think his opinion, which is a unanimous opinion to the Court – I believe one of the justices concurred in result only, but eight justices signed on and it's very hard to read that opinion and believe that that court on that day would have come to a different conclusion.

I do want to make one different point, Your Honor, [39] which I skipped on about the first page of my outline that I want to get back to before we adjourn, which is, on the first of the two issues, I see us as addressing two issues. One is "related to" and the other is what I call the Wolens/Kiefer exception. On the "related to" point I think Your Honor does not have an adequate record to grant summary judgment here. We are all speculating about how this penalty works, why it's imposed, what effect it has on the airlines and what effect it has on consumers. And we have made assertions from experts and assertions from newspaper articles which Mr. McConnico has attacked as either improper or expert testimony or hearsay as to how this thing works, how this fee or transfer fee or whatever it's called, penalty, works.

Although Your Honor may be convinced that this does relate closely enough to price that Your Honor is convinced on that point, I would submit that there's discovery that could be done, minimal discovery, that could be done which would give us a more solid record when this case goes up on appeal, which I imagine it will go up on appeal whichever way –

THE COURT: But let me ask something about that. Doesn't that confuse the concepts of price and the concept of cost? Because the price is what I charge you. The cost is what I have to spend to do the

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[51] MR. SIMON: negligence action and that sure is an aspect an application of the policy of the state of Texas to allow punitive damages against Continental Airlines if some bag fell out of the overhead or if the

plane crashed. That's an application of public policy and the Texas Supreme Court says, go right ahead. That's not a specific law aimed at the airlines, it is not a re-regulation of airlines. We're not re-regulating the airlines, we're trying to regulate the business, the commercial relations among customers and consumers in the state of Texas and this is a case which could be brought against a bank, against an insurance company, against a department store. American Airlines ought to play by the rules everyone else plays, Your Honor.

THE COURT: Well, but I think when you say the commercial relations that you've hit the nail on the head. I mean, I really think that this is the core of what the statute, the congressional statute prohibits. And I understand the argument that the plaintiff is making but I think that the New Jersey court is correct and I think whatever the language of Kiefer, that the Texas Supreme Court would also say that this is preemptive.

So I am going to have to rule for the defendants and let you-all take it on up and if I'm wrong about that I think it's better to find out now than to do all this

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[53] policy that penalty is void, and that seems to me the very thing that Wolens says you can't use contract law for. You can enforce the contract but you can't rewrite the contract or modify the contract based upon state public policies even if it's the uniform public policy of all 50 states.

And so I am going to go ahead and grant summary judgment for the defendants. Is there any problem with

the form of the order here – looks plain vanilla – that the defendants have presented?

MR. SIMON: Your Honor, could we give one more look? I am not sure.

THE COURT: Okay, take a look at it.

(Pause.

MR. SIMON: There's no indication in the order that preemption is the basis for the ruling, so I think that ought to be –

THE COURT: Isn't that the only basis for the motion?

MR. MCCONNICO: Yes, sir.

THE COURT: I am just going to add that all objections to summary judgment evidence are overruled just to preserve your point there so you are not held to have waived it and you can re-urge those in the appellate court if the appellate court thinks that in its [54] decision turns on the evidence. My own view is that my decision doesn't really turn on the evidence.

Okay. Anything else? Let me see, let me give you this so you can it take down, file it. That way if counsel want to get copies from the clerk – you-all gave me a ton of very useful materials which we reviewed. Let me leave that with you. If you want to pick any of it up you can. If you don't, the bailiff will throw it away. And let me say to the plaintiff's co[illegible]el that you-all did an excellent job of briefing and arguing this, And –

MR. SIMON: Thank you, Your Honor, we appreciate your patience on this long –

THE COURT: No, it's a very interesting problem and I am happy to be reversed. I am sure these airlines are all making way too much money.

THE COURT: Thank you-all very much.

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